No. 695 .....

APR
CHARLES ELM

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

RED ROCK COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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Statute:

Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. A. Supp. 141 et seq.):

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To the United States Court of Appeals for the Fifth Circuit.

The petitioner, RED ROCK COMPANY, hereby prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered February 15, 1951, which enforced as to petitioner the order of the National Labor Relations Board (hereinafter called Board) against petitioner.

OPINIONS BELOW.

The opinion of the Court of Appeals (T. 184) is not yet reported. The decision of the Board (T. 94-111) is reported at 84 N. L. R. B. 521.

(T.) refers to Transcript of Record; (B. A.) to Appendix to Board's Brief in C. C. A.; (A.) to Appendix to Company's Brief in C. C. A.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 15, 1951 (T. 190). The petition of Red Rock Company for rehearing, filed March 1, 1951 (T. 191-197), was denied on March 9, 1951 (T. 199). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (hereinafter called the Act) and under 28 U. S. C. A. 1254 (1).

QUESTIONS PRESENTED.

(1) Did the amended answer of Red Rock Company, alleging that the Board was without jurisdiction to issue the complaint because the charging Union had not complied with the filing requirements of Section 9 (f), (g) and (h) of the Act, make a litigable issue before the Board as to such alleged noncompliance;

(2) If such issue is litigable, was the Board's decision, affirmed by the Court of Appeals, finding compliance by the Union, based solely upon so-called "administrative advice" entirely outside the record, supported by any substantial evidence;

(3) Was the Board's decision, affirmed by the Court of Appeals, finding that Red Rock Company had indulged in unfair labor practices in refusing to recognize the Union as the bargaining agent for its driver-salesmen, supported by any substantial evidence?

STATUTE INVOLVED.

The pertinent provisions of the Act are set forth in the Appendix, pages 15 to 22.

STATEMENT.

Charges were filed by Local 859 of the International Brotherhood of Teamsters and Warehousemen and Helpers, A. F. of L. The Board's order was directed against both Red Rock Company and Red Rock Cola Company. The Court of Appeals, however, in so far as concerned Red Rock Cola Company, refused enforcement (T. 188). Therefore, no further reference to Red Rock Cola Company is deemed pertinent to this application. Petitioner is hereinafter referred to as Company.

1. Complaint.

There was no affirmative allegation in the complaint with respect to compliance or noncompliance by the Union with the filing requirements of Section 9 (f), (g) and (h) of the Act.

The complaint, in so far as material to the questions as to which review is sought, charged the Company with alleged unfair labor practices in refusing to recognize the Union as bargaining agent for its driver-salesmen employees.

2. Answer as Amended and Motions.

The original answer of the Company denied all allegations of unfair labor practices set forth in the complaint. By its amended answer the Company alleged affirmatively:

> ". . . that the National Labor Relations Board is without jurisdiction to issue a complaint in that the labor organization therein referred to has not complied with Section 9 (f), (g) and (h) of the Labor Management Relations Act of 1947 . . ." (T. 48).

By written exceptions and motions, and by oral motions the Company made the same contention (T. 153; A. 2, 124).

3. Board Ruling That Issue of Compliance Not Litigable—Offer of Proof by Company.

(a) The Trial Examiner and the Board ruled that the question of noncompliance by the Union with the filing requirements of Section 9 (f), (g) and (h) of the Act could not be put in issue by the Company (R. A. 8-9; T. 95). The Board in its decision stated:

> "We have previously decided, in both unfair labor practice and representation cases, that compliance with the filing requirements of Section 9 (f), (g) and (h) is a matter for administrative determination by the Board and is not litigable by the parties" (T. 95, note 2).

Based upon such ruling, the Trial Examiner, who was sustained by the Board, granted motions of the Board and the Union to quash subpoena duces tecum, which had been issued to the Regional Director of the Board and to the Union representative at the request of the Company, calling for production of documents relating to the issue of noncompliance (R. A. 6-9).

Promptly upon such ruling by the Trial Examiner, the Company's counsel made an offer of proof as follows:

> "The rulings which have just been announced by the examiner have the effect of preventing or precluding the respondents from showing that the labor organization which filed the charges and amended charges has not complied with the requirements of Section 9. In order to complete the record, I wish to state what the proof would show, except for the ruling of the examiner which prevents us from going into that question. The proof, if admitted in this proceeding, would show that the labor organization has not complied with the filing requirements of Section 9" (T. 187, note 2; R. A. 9).

4. Board "Administratively Advised" of Compliance.

Though ruling that compliance was not litigable, the Board nevertheless, through so-called "administrative advice" found as a fact that the Union had complied with Section 9.

> "Moreover, we are administratively advised that the Union has fully complied with the filing requirements of the amended Act" (T. 95).

There is no evidence in the record of such "advice".

5. Court's Ruling on Issue of Section 9 (f), (g) and (h) Noncompliance.

The Court of Appeals in its decision, however, though recognizing that the Company by its answer, as well as by oral and written motions, had raised the issue of the Union's noncompliance,[1] ruled that the Company before the Board had ". . . relied therein, and it must rely here, not upon any proof of its own that the Union had not complied, but upon what it deems the failure of the Union and the Board to carry their burden . . ."[2]

The Court of Appeals, moreover, in its opinion approved the decision of the Trial Examiner and of the Board that the question of compliance was not a matter for pleading and proof at the Board hearing, but was an administrative matter to be determined by the Board itself and that the matter of compliance is not litigable by the parties in this proceeding (T. 187). The Court of Appeals specifically upheld the Board's decision that ". . . we are adminis-

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1 "It is true that Respondent does assert here that, by answer and oral and written motions and expressions, it did undertake below to raise, and to support by proof, its contention that the Union was not in compliance" (T. 186).

2 "An examination of the appendix to Respondent's brief, however, shows that, aside from causing subpoenas to issue, Respondent made no effort to prove affirmatively that there was no compliance" (T. 186).

tratively advised that the Union has fully complied with the filing requirements of the amended act."

At the same time, the Court of Appeals observed that it was not deciding that if, upon a petition for enforcement, **"it is made to appear to this court"** by clear and positive proof that the Board had taken jurisdiction of a charge made by a noncomplying union [with respect to Section 9 (h)] that the court would enforce the Board's order.[3]

6. **Ruling on Refusal to Bargain.**

The Court of Appeals sustained the Board's decision that the Company's refusal to recognize the Union as bargaining agent for the Company's fifteen driver-salesmen was an unfair labor practice.

The facts before the Board and the Court on this issue were as follows:

On February 19, 1947, the Union representative by telegram requested the Company to meet with him and to bargain for the Company's driver-salesmen. The same day he filed a petition for certification (R. A.-G. C. Exh. 2). Following this, a Company official showed the telegram to the driver-salesmen, along with a petition addressed to this official, making reference to the telegram and stating that the persons signing the telegram desired to bargain for themselves and not through a union. The driver-salesmen signed this application along with telegrams which they sent to the Union withdrawing from the Union. The telegrams were requested by several of the driver-salesmen and were prepared by this Company official, with the form of telegram being made available to all of the driver-salesmen.

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3 "This is not to hold that if, on a petition for enforcement, it is made to appear to this court by clear and positive proof that the Board has, contrary to the Statute, taken jurisdiction of a charge made by a noncomplying union . . . this court would enforce the Board's order. On this record, that question is not before us" (T. 187).

Following a meeting between the Union representative and the Company's counsel, the Union representative on March 1, 1948, advised that it was not his desire to represent employees unless they wished it, the Union representative suggesting a secret ballot. The Company's counsel replied that since the employees had stated to the management that they were not represented by the Union, that there appeared to be no occasion for holding an election (R. A. 64-66).

The Union representative on Feb. 19, 1948, had filed with the Board a petition for an election and certification, and this petition he dismissed on March 1, 1948, the same day that he filed on behalf of the Union charges against the Company (T. 9).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In sustaining the decision of the Board that the question of compliance by the charging Union with Section 9 of the Act was not litigable before the Board, but was an administrative matter to be determined by the Board itself.

2. In sustaining the Board's finding of fact (based solely upon so-called "administrative advice") that the charging Union had complied with the filing requirements of Section 9 of the Act, when:

(a) The issue of noncompliance by the Union had been raised before the Board by the Company's amended answer;

(b) There was no evidence before the Board and none in the record before the Court to support such finding; and

(c) The said finding based upon such "administrative advice" was entirely outside the record made before the Board.

3. In construing the Company's position before the Board as being limited to the contention that there was no jurisdiction in the Board because of failure of the Board to affirmatively allege and prove compliance by the Union with Section 9 of the Act, when, in fact, the Company's contention before the Board was a double-barreled one, namely:

(a) There was an affirmative allegation in Respondent's amended answer that the Board was without jurisdiction in that the Union had not complied with the filing requirements of Section 9 of the Act;

(b) There was an objection made to the introduction in the record of the pleadings (charges and complaint) on the ground that such pleadings on their face failed to show compliance with Section 9 and that, therefore, such pleadings were not properly allowed in the record (A. 2).

4. In sustaining the Board's findings that the Company had indulged in an unfair labor practice in refusing to recognize the Union as the bargaining agent for its driver salesmen, when the record disclosed:

(a) That the Union had never been certified by the Board as the bargaining agent of driver salesmen;

(b) That the Union had not been recognized by the Company as bargaining agent for such employees; and

(c) That the Company had questioned the Union's claim and had been advised by its employees that they desired to bargain for themselves.

REASONS FOR GRANTING WRIT.

The questions upon which review is sought are important both from a substantive and procedural standpoint. The questions involve the construction and application of provisions of the Act which have never yet been before this Court, but are constantly recurring before the Board and Courts of Appeal. Such questions should be promptly settled by this Court so as to expedite future litigation before the Board and the courts.

1. Issue of Noncompliance by Union.

The decision of the Board and of the Court of Appeals precludes an employer from raising before the Board the issue of noncompliance with Section 9 by a charging union. This Court has expressly upheld the constitutionality of the provisions of Section 9 (h) of the Act which conditions recognition of a labor union in utilizing processes of the Board upon the filing of non-communistic affidavits.

U. S. Steel Workers of America et al. v. N. L. R. B., 339 U. S. 382 (70 S. Ct. 674);
Osman v. Douds, 339 U. S. 846 (70 S. Ct. 901).

In the former case, this Court held that the provisions of the Act conditioning recognition of labor organizations upon filing of such non-communistic affidavits by its officers is designed to protect the public against what Congress has concluded the Communists and others identified with them have done and are likely to do.

If the decision of the Board and of the Court of Appeals herein is permitted to stand as a correct enunciation of the meaning and intent of the Act, then in spite of the grave danger which Congress believed to exist through such Communist activities, the Board's determination in an ad-

ministrative procedure entirely outside of any record, as to its jurisdiction, in turn dependent upon compliance, is final and not subject to challenge at any place in the proceedings. This result, foreclosing all challenge to the Board's jurisdiction, will obtain regardless of whether in fact a union invoking the jurisdiction of the Board's processes has or has not complied.

Similar claims by governmental agencies to paramount and unreviewable power to determine their jurisdiction or authority have been rejected by this Court as follows:

In **Stark v. Wickard**, 321 U. S. 288 (64 S. Ct. 559), holding that the responsibility of determining limits of statutory grants of authority is a judicial function entrusted to the courts by Congress;

Hannegan v. Esquire, 327 U. S. 146 (66 S. Ct. 456), rejecting Postmaster General's similar contentions;

National Labor Relations Board v. Jones and Laughlin, 301 U. S. 1 (57 S. Ct. 615), holding that upon review of a Board's order all questions of jurisdiction of the Board are open to examination by the Court;

Social Security Board v. Nierotko, 327 U. S. 358 (66 S. Ct. 637), holding that an agency may not finally decide the limits of its statutory power, which is a judicial function.

Though of a less serious nature and of less serious consequences, the requirements of Section 9 (f) and (g) with respect to filing of financial data would likewise be foreclosed by the Board's decision. The constitutionality of such requirements have been upheld by the Circuit Court of Appeals for the Second Circuit in **Fay v. Douds**, 172 F. (2) 720.

If the issue of noncompliance raised before the Board by the Company's amended answer in the present pro-

ceeding is a litigable issue, then the findings by the Board in the present case are wholly unsupported by any evidence, in direct contravention of the requirements of Section 10 (b) and (e) of the Act, and the Company has been deprived of the opportunity afforded under Section 10 (b) of appearing and giving testimony upon issues raised by the complaint and answer.

This result is in conflict with this Court's decision in **N. L. R. B. v. Michigan Electric Co.**, 318 U. S. 9 (63 S. Ct. 394), holding that orders of the Board should not be enforced where hearings before the Board have shut off a party's right to produce evidence material to an issue.

The comment by the Court of Appeals (T. 187), as to what its ruling might be in a petition for enforcement **where evidence be presented to such court as to noncompliance** by the charging union, is not pertinent to the question which was before the court. The Court of Appeals, under Section 10 (e) of the Act, was required to consider the case **upon the record made before the Board.**

2. **Refusal to Recognize Union.**

The decision of the Board, sustained by the Court of Appeals, finding an unfair labor practice by the Company in refusing to recognize the union as bargaining agent for the driver-salesmen presents an important question under the Act and one which has not been decided by this Court.

This question involves a situation where the union has not been certified by the Board, has not been recognized by the employer, and where the employer has been advised by its employees that they desire to bargain for themselves. Under such circumstances, the decision that the Company was guilty of unfair labor practice in refusing to recognize such union is in the very teeth of the Act.

Section 9 (a) of the Act provides that representatives designated or selected for purpose of collective bargaining "by the majority of the employees in a unit appropriate for such purposes" shall be the exclusive representatives of all of the employees in such unit for the purpose of collective bargaining.

The machinery of the Act set up for determining an appropriate unit requires an election, Section 9 (c) (1) (5), and where there is application for judicial enforcement of the Board's order in an unfair labor practice proceeding involving representation, the Act requires that the record made by the Board in the certification proceeding must accompany the record of the Board in such unfair labor practice proceedings.

The decision of the Board and of the Court in the present case, however, makes it an unfair labor practice for a company to refuse to recognize a union where, though the union has filed a petition for certification, it has dismissed it, and there has been no election or certification proceeding, and the company has not recognized the union, but on the contrary has been advised by its employees that they desire to bargain for themselves.

It is believed that the Act contemplates under such circumstances there must be a certification by the Board before a company can be chargeable with an unfair labor practice in refusing to recognize such union.

CONCLUSION.

For the reasons stated above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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